

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
GALLATIN RIVER BASIN (41H)  
PRELIMINARY DECREE

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CLAIMANT: Lyman Creek LLC

OBJECTORS: City of Bozeman; Lyman Creek LLC

COUNTEROBJECTOR: City of Bozeman

**CASE 41H-0092-R-2021**

41H 115677-00

41H 179248-00

41H 179249-00

41H 179251-00

41H 179252-00

**ORDER GRANTING MOTION TO  
DISMISS CLAIMS AND AMEND OBJECTIONS**

**I. INTRODUCTION**

This case involves water right claims owned by Lyman Creek, LLC. The City of Bozeman objected to Lyman Creek's claims. Bozeman filed a motion seeking to dismiss two of Lyman Creek's claims and amend its objections to claims 41H 115677-00 and 41H 179251-00 and its counterobjection to claim 41H 179248-00.

**II. ISSUES**

1. Should claims 41H 179249-00 and 41H 179252-00 be dismissed?
2. Should Bozeman's motion to amend its objections and counterobjection be granted?

**III. DISCUSSION**

1. Should claims 41H 179249-00 and 41H 179252-00 be dismissed?

Bozeman tendered Requests for Admission to Lyman Creek regarding claims 41H 179249-00 and 41H 179252-00. The Requests asked Lyman Creek whether claims 41H

179249-00 and 41H 179252-00 should be dismissed because there was no evidence of historic use of water on the claimed places of use. Lyman Creek admitted both claims should be dismissed in its discovery responses and did not oppose dismissal in its response to Bozeman's current motion. Accordingly, Bozeman's motion to dismiss claims 41H 179249-00 and 41H 179252-00 is granted.

2. Should Bozeman's motion to amend its objections and counterobjection be granted?

Bozeman seeks to amend its objections and counterobjection to three of Lyman Creek's water rights. Amendments to objections are authorized by Rule 10, W.R.Adj.R. and governed by Rule 15, M. R. Civ. P. Bozeman's motion to amend was filed more than 21 days after its original objections were served, so Rule 15(a)(2), M. R. Civ. P. applies. Rule 15(a)(2), M. R. Civ. P. states, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

"Rule 15(a), M.R.Civ.P., is to be interpreted liberally, making the allowance of amendments the general rule and denials the exception, nevertheless that does not mean that a court must automatically grant a motion to amend." *Stundal v. Stundal*, 2000 MT 21, ¶ 13, 298 Mont. 141, 995 P.2d 420. "[A]mendments to pleading [sic] are not appropriate when the party opposing the amendment would incur substantial prejudice as a result of the amendment." *Stundal*, ¶ 12.

Bozeman seeks amendment of its objections so it can raise the issue of abandonment. It decided to raise the issue of abandonment after finding a conservation easement had been granted to Montana Land Reliance for Lyman Creek's land. Bozeman obtained a copy of the easement and copies of annual inspections created in conjunction with it, and concluded these documents supported an abandonment challenge. Bozeman's attorney asserts he learned of the conservation easement on or about November 17, 2022 and served a subpoena duces tecum on Montana Land Reliance the next day. After obtaining additional documents from MLR, Bozeman filed its motion to amend on December 15, 2022.

Lyman Creek opposes amendment of Bozeman's objections, arguing that "the City's Motion...is made in bad faith, would prejudice the non-moving party, and is legally futile." *Lyman Creek, LLC's Response to Motion to Dismiss Claims and Amend Counter-Objections*, 4 (Dec. 29, 2022).

Lyman Creek asserts Bozeman's motion was tendered in bad faith because Bozeman recently opposed intervention by Trout Unlimited. Lyman Creek contends the arguments made by the City in opposition to Trout Unlimited's requested intervention contradict the arguments it made in support of its motion to amend.

Although the tests for intervention and amendment of pleadings have similarities, they are not the same. Allowing intervention by a new party late in a case is different from allowing amendment to a pleading, especially where the party seeking intervention had notice and an opportunity to participate at the front end of the adjudication process. Late intervention by a new party has the potential to create substantial delay and prejudice.

Here, Lyman Creek knew of the conservation easement on its property and presumably knew of the inspection and reporting requirements associated with that easement. Lyman Creek could have produced the easement and inspection reports during discovery but did not. Under these circumstances, Lyman Creek's argument that Bozeman is acting in bad faith is not credible.

Lyman Creek has not shown Bozeman acted based on a dilatory motive. Bozeman filed its motion to amend within a reasonable time after discovering the conservation easement. There is no evidence Bozeman waited to file its motion because it was not diligent or because it sought tactical advantage.

Lyman Creek asserts Bozeman's motion is legally futile but offers no credible argument in support of that assertion. Showing that a proposed amendment is futile can be the basis for denial of a motion to amend, but bald claims of futility without supporting information are insufficient to meet the applicable legal standard. *Stevens v. Novartis Pharms. Corp.*, 2010 MT 282, ¶ 64, 358 Mont. 474, 247 P.3d 244.

Lyman Creek next argues it will be prejudiced if Bozeman is allowed to amend its objections and raise the issue of abandonment. Lyman Creek asserts the parties have already conducted site inspections of the property and that expert witnesses have already formed their opinions and prepared their reports. Lyman Creek further contends it is prejudiced because Bozeman did not produce a copy of the conservation easement until recently.

Expert witnesses frequently modify their positions based on evidence received after their initial opinions have been formed. Lyman Creek was almost certainly in possession of the conservation easement on its property and could have made its experts aware of that easement and its implications, if any, before soliciting expert opinions. Had Lyman Creek done so, it would have avoided the prejudice it now describes.

The question is whether Lyman Creek will suffer substantial prejudice or mere inconvenience. Substantial prejudice does not exist here because Lyman Creek presumptively controlled the information relied upon by Bozeman to seek amendment of its pleadings. Even if Lyman Creek's experts must revise their opinions, which has not been proven necessary, Lyman Creek will at most be inconvenienced.

Trial has not yet been scheduled. Lyman Creek has not shown how granting Bozeman's motion to amend will cause undue delay. More work may be required, but that does not mean this case must be started over, or that trial must be delayed. Lyman Creek has not shown that its ability to defend its water rights will be impaired or that it will face substantial prejudice if amendment is allowed.

#### IV. CONCLUSION

Bozeman's motion to dismiss claims 41H 179249-00 and 41H 179252-00 is granted. Abstracts confirming dismissal will be attached to this Court's final order.

Bozeman's motion to amend its objection to claim 41H 115677-00 and 41H 179251-00 and its counterobjection to claim 41H 179248-00 to include an assertion of post-July 1, 1973, abandonment is granted.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

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